

Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CLYDE RAY SPENCER, MATTHEW RAY
SPENCER, and KATHRYN E. TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING
ATTORNEY FOR CLARK COUNTY
JAMES M. PETERS, DETECTIVE
SHARON KRAUSE, SERGEANT
MICHAEL DAVIDSON, CLARK COUNTY
PROSECUTOR'S OFFICE, CLARK
COUNTY SHERIFF'S OFFICE, THE
COUNTY OF CLARK, SHIRLEY
SPENCER, and JOHN DOES ONE
THROUGH TEN,

Defendants.

NO. C11-5424 BHS

DEFENDANT MICHAEL
DAVIDSON'S SUMMARY
JUDGMENT MOTION

NOTE ON MOTION
CALENDAR: June 22, 2012

I. RELIEF REQUESTED

Defendant Michael Davidson moves for summary judgment seeking dismissal of all claims against him with prejudice pursuant to Federal Rules of Civil Procedure 56. Defendant Davidson's motion is based on the statute of limitations as to all plaintiffs' state law claims, plaintiffs' inability to prove defendant Davidson defamed Mr. Spencer, collateral estoppel precluding re-litigation of three of Mr. Spencer's federal constitutional claims, qualified

1 immunity for all § 1983 claims, inability to prove a conspiracy, and inability to prove
2 defendant Davidson proximately caused the alleged damage.

3 II. MATERIAL FACTS

4 A. Summary of Plaintiffs' Claims

5 In 1985, plaintiff Clyde Ray Spencer entered an *Alford* plea of guilty to multiple
6 counts of sexually abusing his two biological children (plaintiffs Matthew Spencer and
7 Kathryn Tetz) and his step-son Matthew Hansen. Dkt. 1 (Complaint), pp. 6, 16, 18, 23-24,
8 25, ¶¶ 31, 36, 97, 112, 151-52, 159. After several unsuccessful appeals, his prison sentence
9 was commuted to community supervision in 2004 by then Governor Locke. *Id.*, pp. 30-32,
10 35, ¶¶ 203-05, 213-15, 238.

11 Following his release from prison, his biological children recanted their prior
12 disclosures of sexual abuse by Mr. Spencer. *Id.*, p. 36, ¶¶ 241-42. Matthew Hansen has not
13 recanted his prior disclosures of sexual abuse by Mr. Spencer. *See* Dkt. 54 and 54-1
14 (Declaration of Matthew Hanson and Exhibits A and B attached thereto).

15 In 2009, the state Court of Appeals ruled Mr. Spencer could withdraw his *Alford* plea
16 of guilty based on two of the three victims' recantations and vacated his conviction. Dkt. 1,
17 pp. 2-3, 37, ¶¶ 5, 244. In August 2010, the Clark County Prosecuting Attorney's Office
18 dismissed the charges against Mr. Spencer without prejudice. *Id.*, p. 3, ¶ 5.

19 In June 2011, he and his two biological children (now adults) filed this lawsuit
20 alleging federal civil rights and state tort claims. *Id.*, pp. 45-67, ¶¶ 289-394. Mr. Spencer
21 alleges seven causes of action under 42 U.S.C. § 1983, plus four state law claims. *Id.*, pp. 45-
22 65, ¶¶ 289-382. His federal claims are for malicious prosecution, deprivation of due process,
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1 “destruction or concealment of exculpatory evidence,” conspiracy, “failure to intervene,” false
 2 arrest, and false imprisonment. *Id.*, pp. 45-58, ¶¶ 289-349. His state law claims are for
 3 malicious prosecution, intentional infliction of emotional distress (“IIED”), conspiracy, and
 4 defamation. *Id.*, pp. 59-65, ¶¶ 350-82. These federal and state claims are alleged against all
 5 defendants except Shirley Spencer, who is a named defendant only as to Mr. Spencer’s § 1983
 6 conspiracy claim and his state law claims for IIED and conspiracy. *See id.*

8 His biological children allege state law claims for “loss of consortium.” *Id.*, pp. 66-
 9 67, ¶¶ 383-94. Their claims are alleged against all defendants, except Shirley Spencer. *Id.*

10 **B. Investigations and Arrest Based on Plaintiffs Kathryn Tetz’s, Plaintiff**
 11 **Matthew Spencer’s, and Non-Party Matthew Hansen’s Disclosures of**
 12 **Sexual Abuse by Plaintiff Ray Spencer**

13 On August 24, 1984, plaintiff Kathryn Tetz (nee Spencer), then age 5 (DOB January
 14 13, 1979), inappropriately touched plaintiff Ray Spencer’s second wife, defendant Shirley
 15 Spencer. *See* Dkt. 1, pp. 6, 7, ¶¶ 31, 40. When asked where she learned these sexual
 16 behaviors, Ms. Tetz told Shirley Spencer that her father and three others, including her brother
 17 Matthew Spencer, had touched her private parts and that she had oral sex with her father. *Id.*;
 18 Dkt. 53 and 53-1 (Declaration of Shirley Spencer and Exhibit A attached thereto); Declaration
 19 of Sharon Krause (“Krause Decl.”) and Exhibit (“Ex.”) 1 thereto (Shirley Spencer’s written
 20 description of Ms. Tetz’s disclosure). Shortly after this disclosure, Ms. Tetz returned to
 21 Sacramento, California where she lived with her biological mother, DeAnne Spencer, who
 22 had divorced Ray Spencer in 1981 due to his infidelities. Dkt. 1, pp. 5, 6, 7, ¶¶ 26, 34, 41.

24 Mr. Spencer found his daughter’s reports of abuse sufficiently credible to cause him to
 25 report her disclosures to Child Protective Services and the Vancouver Police Department. *Id.*,
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1 p. 7, ¶ 41. Ms. Tetz's disclosures of sexual abuse were investigated by the Sacramento Police
 2 Department, the Vancouver Police Department where Mr. Spencer was employed, and
 3 defendant Clark County Sheriff's Office ("CCSO"). *See id.*, pp. 7-8, ¶¶ 41-42, 47.

4 In October 1984, Ms. Tetz was interviewed by defendant Sharon Krause, a detective
 5 then employed by the CCSO. Krause Decl. at Ex. 2. Ms. Tetz confirmed that Mr. Spencer
 6 had sexually abused her as she had previously disclosed to Shirley Spencer and provided
 7 details of that abuse, but said no one else had abused her. *Id.*, pp. 4-13.

9 In November 1984, a King County prosecutor reviewed Shirley Spencer's description
 10 of Ms. Tetz's disclosure and detective Krause's interview of Ms. Tetz and opined that,
 11 "[a]lthough I believe [the] child was clearly abused and probably by the defendant [Mr.
 12 Spencer], the case is unwinnable even assuming you/we can get the child to talk."
 13 Declaration of Jeffrey Freimund ("Freimund Decl.") at Ex. 1 (prosecutor's letter), p. 3.

15 On January 3, 1985, the Clark County prosecutor charged Mr. Spencer with two
 16 counts of sexually abusing his daughter and he was released by the Court on personal
 17 recognizance. Freimund Decl. at Ex. 2 (Information).

18 A few days later, Mr. Spencer was fired from his employment with the Vancouver
 19 Police Department following an Internal Affairs investigation. Dkt. 1, p. 16, ¶ 98. The
 20 reasons given for his termination on January 8, 1985 were that he had: (1) forcibly raped an
 21 18 year old neighbor girl in 1978; (2) engaged in a sexual relationship with a female
 22 informant in 1980 while operating undercover without reporting the relationship to
 23 supervisors, (3) made false reports that the informant had discovered his identity as a police
 24 officer in 1980; and (4) engaged in a sexual relationship with his five year old daughter in
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1 1984. Freimund Decl. at Ex. 3 (Notice of Dismissal and Bill of Particulars).

2 On February 3, 1985, Mr. Spencer told Shirley Spencer he wanted a divorce and
3 moved out of their home. Dkt. 53 and 53-1 (Exhibit B to Shirley Spencer's Declaration).

4 On February 28, 1985, Shirley Spencer notified Detective Krause that she was
5 concerned Mr. Spencer may have sexually molested her then five year old son, Matthew
6 Hansen. Krause Decl. at Ex. 3, pp. 2-9; Freimund Decl. at Ex. 4 (Motion and Affidavit for
7 Arrest Warrant). Matthew Hansen disclosed to Detective Krause that he had been molested
8 by Mr. Spencer and had witnessed Mr. Spencer molesting Ms. Tetz and Matthew Spencer.
9 Krause, Decl. at Ex. 3, pp. 15-22; Freimund Decl. at Ex. 4, pp. 2-4.

11 Based on Matthew Hansen's disclosure, an Amended Information was filed charging
12 Mr. Spencer with three counts of statutory rape of Matthew Hansen. Dkt. 1, p. 18, ¶ 112.
13 Defendant Clark County Prosecutor James Peters filed a motion and affidavit for an arrest
14 warrant and a Clark County Superior Court Judge found probable cause to issue the warrant.
15 Freimund Decl. at Exs. 4 and 5 (Order Directing Issuance of Arrest Warrant). Mr. Spencer
16 was arrested later that day pursuant to the warrant. Dkt. 1, p. 18, ¶ 113. One of the arresting
17 officers was defendant Michael Davidson, then a supervising Sergeant for the CCSO. *Id.*

19 Following his arrest, Mr. Spencer waived his *Miranda* rights and agreed to speak with
20 Detective Krause and Sergeant Davidson. Krause Decl. at Ex. 4. During this February 28,
21 1985 interview, Mr. Spencer stated "I must have done it if Little Matt [Hansen] said I did; this
22 can't be my ex-wife this time." *Id.*, p. 3. When asked if he could explain why Matthew
23 Hansen was reporting Mr. Spencer abused him if it was not true Mr. Spencer replied, "Well it
24 must be. I just don't understand why I can't remember it." *Id.*, p. 4.

1 On March 25, 1985, Detective Krause interviewed Mr. Spencer's then nine year old
 2 son, plaintiff Matthew Spencer. Krause Decl. at Ex. 5. Matthew Spencer corroborated
 3 Matthew Hansen's account that Mr. Spencer had sexually abused both boys and Ms. Tetz.
 4 *Id.*, pp. 3-12. Detective Krause re-interviewed Ms. Tetz separately the same day, and Ms.
 5 Tetz corroborated Matthew Spencer's and Matthew Hansen's disclosures of Mr. Spencer's
 6 sexual abuse of all three children. *Id.*, at Ex. 6, pp. 2-5.

8 C. Mr. Spencer's *Alford* Plea to Sexually Abusing Three Children

9 On May 3, 1985, the prosecutor filed a Second Amended Information charging Mr.
 10 Spencer with ten counts of first degree statutory rape and six counts of complicity to first
 11 degree statutory rape based on the disclosures of all three children. Freimund Decl. at Ex. 6
 12 (Second Amended Information). Days later Mr. Spencer's criminal defense attorney
 13 interviewed the children, along with the prosecutor. Dkt. 1, p. 23, ¶¶ 148-49.

15 Mr. Spencer's trial for sexually abusing the three children was set to begin on May 20,
 16 1985. Dkt. 1, p. 23, ¶ 146. On May 16, 1985, Mr. Spencer changed his plea from not guilty
 17 to an *Alford* plea in which he pled guilty to seven counts of first degree statutory rape and four
 18 counts of complicity to first degree statutory rape as part of a plea bargain that resulted in
 19 voluntary dismissal of three counts of first degree statutory rape and two counts of complicity
 20 to first degree statutory rape. Freimund Decl. at Ex. 7 (Statement of Defendant on Plea of
 21 Guilty). After the details of each charge were read to Mr. Spencer on the record, the Court
 22 asked if he had any basis to refute the children's disclosures of his sexual abuse, to which he
 23 uniformly replied, "No, sir." *Id.* at Ex. 8 (certified transcript of the May 3, 1985 filing of the
 24 Second Amended Information, the May 16, 1985 change of plea hearing, and the May 23,
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1 1985 sentencing hearing), pp. 20-35. When agreeing to the plea, Mr. Spencer acknowledged
 2 the Court could sentence him to life imprisonment for his crimes. *Id.*, at pp. 16-18.

3 On May 23, 1985, the Court entered two Judgments and Sentences sentencing Mr.
 4 Spencer to life imprisonment. Freimund Decl. at Ex. 9 (two Judgment and Sentence orders).
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6 **D. Mr. Spencer's Unsuccessful 1986 Appeal of His Conviction**

7 In May 1986, Mr. Spencer moved to withdraw his guilty plea and vacate his
 8 conviction. Freimund Decl. at Ex. 10 (Court of Appeals Order Dismissing Petition), pp. 1-2.
 9 He raised several constitutional claims, including (1) his plea was involuntary because he was
 10 under the influence of narcotics at the time, (2) he was coerced by Sergeant Davidson to plead
 11 guilty during jail visits motivated by Sergeant Davidson's alleged romantic involvement with
 12 Shirley Spencer, (3) the prosecutor failed to disclose exculpatory evidence, specifically the
 13 King County prosecutor's opinion that a conviction was unlikely based solely on Ms. Tetz's
 14 initial disclosure and medical reports concluding there was no physical evidence Ms. Tetz and
 15 Matthew Hansen were sexually abused, (4) his right against self-incrimination was violated,
 16 and (5) his defense counsel provided ineffective assistance. *Id.*, at pp. 2-6. The trial court
 17 denied the motion and the Court of Appeals affirmed in August 1988, concluding (1) two
 18 mental health professionals found him competent and the transcript of his plea hearing
 19 confirmed those assessments, (2) his admissions in open court that his guilty plea was not
 20 coerced outweighed his assertion that Sergeant Davidson coerced him, (3) the prosecutor did
 21 not breach a duty to disclose exculpatory evidence and, even if he did, Mr. Spencer was
 22 unable to prove the King County prosecutor's opinion and the medical reports concerning Ms.
 23 Tetz and Matthew Hansen would have caused him to go to trial instead of pleading guilty, (4)
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1 Mr. Spencer was properly advised of his constitutional rights before pleading guilty, and (5)
 2 his defense attorney's assistance was effective. *Id.*

3 **E. Mr. Spencer's Unsuccessful 1989 Appeal of His Conviction**

4 Mr. Spencer filed a personal restraint petition ("PRP") alleging the trial judge was
 5 biased against him, a pre-sentence report should have been completed, and his constitutional
 6 rights were violated by use of "mechanical" sentencing formulas. Freimund Decl. at Ex. 11
 7 (Court of Appeals Order Dismissing Petition). The Court of Appeals dismissed the PRP as
 8 frivolous in September 1989. *Id.*, p. 2. The state Supreme Court denied discretionary review.
 9 *Id.*, at Ex. 12 (Ruling Denying Motion for Discretionary Review).

11 **F. Mr. Spencer's Unsuccessful 1994 Habeas Corpus Petition**

12 In 1994, Mr. Spencer sought habeas relief in federal court after exhausting state court
 13 remedies. Freimund Decl. at Ex. 13 (Magistrate's Report and Recommendation and Judge's
 14 Order adopting the same). He again raised several constitutional claims, including (1) his
 15 guilty plea was involuntary because he was under the influence of narcotics, (2) Sergeant
 16 Davidson unlawfully coerced his guilty plea during jail visits motivated by his alleged
 17 romantic involvement with Shirley Spencer, (3) the prosecution failed to disclose exculpatory
 18 evidence, including the medical examinations of Ms. Tetz and Matthew Hansen concluding
 19 there was no physical evidence of sexual abuse, and (4) his defense counsel provided
 20 ineffective assistance. *Id.*, pp. 2-22. The federal court granted the State's summary judgment
 21 motion to dismiss the habeas petition, concluding (1) Mr. Spencer was competent to
 22 understand the consequences of his guilty plea, (2) Sergeant Davidson did not
 23 unconstitutionally coerce Mr. Spencer even if the jail visits occurred as alleged by Mr.
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1 Spencer, (3) there was no reasonable probability the two withheld medical reports would have
 2 caused Mr. Spencer to proceed to trial rather than plead guilty, and (4) his defense counsel
 3 provided adequate assistance. *Id.*

4 **G. Mr. Spencer's Appeal of the Federal District Court's 1994 Judgment**

5 The Ninth Circuit Court of Appeals affirmed in part and reversed in part the District
 6 Court's dismissal of Mr. Spencer's habeas corpus petition. Freimund Decl. at Ex. 14 (Ninth
 7 Circuit Memorandum). The Court concluded as follows: (1) Mr. Spencer was entitled to an
 8 evidentiary hearing to determine if he was competent when he pled guilty; (2) Sergeant
 9 Davidson did not unlawfully coerce Mr. Spencer to plead guilty; (3) Mr. Spencer was entitled
 10 to an evidentiary hearing to determine if there was a reasonable probability the two withheld
 11 medical reports would have caused him to proceed to trial rather than plead guilty; and (4)
 12 Mr. Spencer was adequately represented by his defense counsel, especially since Mr. Spencer
 13 "did not exactly say that he did not commit the acts, but ... assumed a posture that he could
 14 not remember doing them." *Id.*, pp. 2-9 (quote from pp. 8-9).

17 **H. The 1996 Evidentiary Hearing on Mr. Spencer's Habeas Petition**

18 Judge Robert Bryan conducted the evidentiary hearing over the course of three days.
 19 After hearing testimony from several witnesses, he concluded: (1) Mr. Spencer was
 20 competent to enter his guilty plea; (2) the Clark County Prosecuting Attorney and the CCSO
 21 never possessed or controlled the medical report regarding Matthew Hansen, so neither had a
 22 duty to disclose that report to Mr. Spencer's counsel under *Brady v. Maryland*, 373 U.S. 83
 23 (1963); and (3) "it is probable that if Mr. Spencer had Kathryn Spencer's [Tetz's] medical
 24 report, it would not have been sufficiently exculpatory or persuasive to cause him to refuse to
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1 plead guilty and to go to trial: Kathryn Spencer's medical report was not likely to persuade
 2 the trier of fact that Mr. Spencer was not guilty of the crimes charged." Freimund Decl. at Ex.
 3 15 (Judge Bryan's September 25, 1996 Order Including Findings of Fact and Conclusions of
 4 Law), pp. 2-4 (quote from p. 4, lines 17-20). Accordingly, the Court concluded Mr. Spencer's
 5 federal due process rights were not violated when the prosecutor and the CCSO failed to
 6 disclose the medical reports, and denied Mr. Spencer's habeas corpus petition. *Id.*

8 **I. Mr. Spencer's Unsuccessful Appeal of the 1996 Evidentiary Hearing**

9 Mr. Spencer again appealed Judge Bryan's ruling. The Ninth Circuit affirmed,
 10 concluding in part, "[t]here is no reasonable probability that production of the medical reports
 11 of these two victims would have caused Spencer to choose to go to trial rather than to plead
 12 guilty. ... Expert testimony regarding the flaws and limited exculpatory value of the medical
 13 reports demonstrated that the withheld information would not have been persuasive at trial."
 14 Freimund Decl. at Ex. 16 (Ninth Circuit's October 1997 Memorandum) (quote from p. 2).
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16 **J. Mr. Spencer's Unsuccessful 2000 Appeal of His Sentence**

17 In 1999, Mr. Spencer filed another PRP in state court; this time challenging the length
 18 of his prison sentence and the addition of 60 months to his minimum sentence in 1998 due to
 19 his failure to obtain sexual deviancy treatment. The Court of Appeals denied the petition
 20 concluding Mr. Spencer's lack of rehabilitation justified his sentence, and noting "Spencer's
 21 psychological evaluation was not entirely favorable to his parole request." Freimund Decl. at
 22 Ex. 17 (June 2000 Order Denying Petition) (quote from p. 5).
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24 **K. Governor Locke's Commutation of Mr. Spencer's Sentence**

25 On December 23, 2004, then Governor Gary Locke conditionally commuted Mr.
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1 Spencer's remaining sentence from lifetime imprisonment to three years of community
 2 custody. Dkt. 1, p. 35, ¶ 238. The commutation was entered with no reference to the several
 3 court rulings dismissing Mr. Spencer's claims regarding the validity of his guilty plea, alleged
 4 coercion to plead guilty, alleged withholding of exculpatory evidence, the length of his prison
 5 sentence, and other constitutional challenges. Freimund Decl. at Ex. 18 (Governor's
 6 Conditional Commutation). The commutation was entered mainly because the Governor
 7 concluded Mr. Spencer "has now served more time than anyone convicted of the same crime
 8 under the Sentencing Reform Act." *Id.*, p. 1. Mr. Spencer's community supervision was
 9 subject to 15 conditions, which according to plaintiffs "were the same as those imposed upon
 10 a predator that would be expected to re-offend." *Id.*, pp. 2-3; Dkt. 1, p. 36, ¶ 240.

12 **L. Plaintiff Matthew Spencer's 2003 Letter to the Governor**

13 While Governor Locke was considering whether to commute Mr. Spencer's
 14 sentence, plaintiff Matthew Spencer wrote a letter to the Governor urging him to keep Mr.
 15 Spencer in prison. Freimund Decl. at Ex. 19 (Matthew Spencer's March 2003 Letter). At age
 16 26 (DOB November 28, 1975, *see* Dkt. 1, p. 6, ¶ 31), Matthew Spencer wrote in part:

18 I have experienced a certain amount of security since [my father's]
 19 incarceration. The thought that he may be released has set me on edge.
 20 Will I have to spend the rest of my life looking over my shoulder? My
 21 childhood was spent in baseball parks and therapy offices. Baseball
 22 parks thanks to my mom, therapy offices thanks to my father. The
 23 nightmares have gone but the emotional terror he and his friends
 24 subjected me and my sister to surfaces with thoughts of him. He even
 25 hired investigators to hunt me down when I was 19 years old. They
 26 waited outside my house at 5:00 a.m. one morning to try and confront
 me. I was enraged but able to scare them off with a baseball bat. ... To
 this day he has not admitted his crimes, nor has he received any
 rehabilitation. ... Perhaps if he admitted and began rehabilitation I would
 feel differently but he has not. I am afraid not only for myself, my sister
 and my mom but also for any children he may come in contact with. It is

1 my hope you will deny his request.

2 Freimund Decl. at Ex. 19.

3 **M. Mr. Spencer's 2009 PRP Following His Release from Prison**

4 Shortly after Mr. Spencer was released from prison, his two biological children
5 recanted their disclosures of sexual abuse. Freimund Decl. at Ex. 20 (Order Transferring
6 Petition for Reference Hearing), p. 1. With these recantations in hand, Mr. Spencer filed
7 another PRP claiming this new evidence justified withdrawal of his *Alford* plea. *Id.*, p. 1.

9 The Court of Appeals ordered a reference hearing for the sole purpose of determining
10 whether Ms. Tetz and Matthew Spencer would testify consistent with their written
11 recantations. *Id.*, p. 14. The State sought clarification regarding the scope of the reference
12 hearing, including whether the State would be permitted to call additional witnesses or
13 experts, or offer documentation from other courts that ruled on Mr. Spencer's prior appeals.
14 Freimund Decl. at Ex. 21 (Order Clarifying Reference Hearing Order), p. 1. The Court of
15 Appeals clarified that the only witnesses would be Ms. Tetz and Matthew Spencer, the "State
16 may not attempt to explore or explain any 'alleged irregularities' that occurred in the
17 underlying investigation and plea proceedings" and the "State may not rely on or argue
18 previous court rulings." *Id.*, pp. 1-2.

20 The Superior Court conducting the reference hearing concluded both Ms. Tetz and
21 Matthew Spencer testified consistent with their written recantations. Freimund Decl. at Ex.
22 22 (Findings of Fact on Reference Hearing), pp. 2-3. The State moved for reconsideration
23 requesting the Superior Court to make a finding as to whether the recantations were credible,
24 but the Court denied the motion. *Id.*, at Ex. 23 (Order Denying Reconsideration), pp. 1-2.
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1 Based on the reference hearing, the Court of Appeals granted Mr. Spencer's PRP
 2 holding the two recantations were newly discovered evidence sufficiently undermining the
 3 factual basis for Mr. Spencer's *Alford* plea to justify withdrawal of the plea and order a new
 4 trial pursuant to RAP 16.4(c)(3). *In re Clyde R. Spencer*, 152 Wn. App. 698, 707, 712, 218
 5 P.3d 924 (2009). Unlike in Mr. Spencer's prior proceedings, the Court did not determine
 6 whether any of Mr. Spencer's constitutional rights were violated. *See id.* at 707 (not relying
 7 on RAP 16.4(c)(2), which authorizes granting a PRP based on constitutional violations). The
 8 Court did, however, conclude some of Mr. Spencer's prior constitutional claims, which the
 9 State was not permitted to rebut, supported his argument that the factual basis underlying the
 10 *Alford* plea had changed. *Id.*, at 712-15.

12 In July 2010, a Supreme Court Commissioner denied the State's petition for
 13 discretionary review of the Court of Appeals' opinion. Freimund Decl. at Ex. 24. The
 14 Commissioner reasoned as follows: "The Court of Appeals held that M.S.'s and K.S.'s
 15 recantations, viewed in light of the record, undermined the factual basis for Mr. Spencer's
 16 *Alford* plea sufficiently to justify withdrawal. I agree." *Id.*, p. 5.

18 **N. Vacation of Conviction and Order of Dismissal without Prejudice**

19 On September 29, 2010, the Superior Court vacated Mr. Spencer's conviction and
 20 allowed him to withdraw his guilty plea. Freimund Decl. at Ex. 25 (Order). The same day,
 21 the Superior Court granted the State's motion to dismiss the 1985 charges against Mr. Spencer
 22 without prejudice. *Id.*, at Ex. 26 (Motion and Order for Dismissal without Prejudice).

24 Plaintiffs filed this lawsuit on June 2, 2011; twenty-six years after plaintiffs' alleged
 25 damages occurred - - *i.e.*, Mr. Spencer's conviction and imprisonment. *See* Dkt. 1.
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III. LAW AND ARGUMENT

A. Plaintiffs' State Law Claims Are Time-Barred, Except Mr. Spencer's Defamation Claim

Plaintiff Ray Spencer alleges state law claims for malicious prosecution, intentional infliction of emotional distress, conspiracy, and defamation. Dkt. 1, pp. 59-65, ¶¶ 350-82. Plaintiffs Matthew Spencer and Kathryn Tetz allege state law claims for loss of consortium. *Id.*, pp. 66-67, ¶¶ 383-94. All of these claims are time-barred as a matter of law by the statute of limitations, with the sole exception of Mr. Spencer's defamation claim, which allegedly accrued in August 2010. *Id.*, pp. 40-43, ¶¶ 264-78.

RCW 4.16.080(2) provides a three year limitations period for personal injury actions. RCW 4.16.100(1) provides a two year limitations period for defamation actions.

State law determines when a state law action accrues. *Doggett v. Perez*, 348 F.Supp.2d 1169, 1175 (E.D.Wash. 2004). Personal injury actions ordinarily accrue at the time the challenged act or omission occurs. *Id.* Here, the challenged acts or omissions occurred by no later than 1985 when Mr. Spencer was convicted and sentenced to life imprisonment following his *Alford* plea. *See id.*, at 1176-77.

Accrual of federal § 1983 claims is determined by federal law. *Id.*, at 1173. Under federal law, a § 1983 claim challenging a conviction "does not accrue until the conviction or sentence has been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994).

Washington has not adopted the federal *Heck* rule for determining accrual of state law claims. *Doggett*, 348 F.Supp.2d at 1176. Under Washington law, causes of action arising out of an arrest or conviction must be commenced within two or three years of the conviction even if the conviction has yet to be invalidated. *Id.*, at 1176-77; *Gausvik v. Abbey*, 126 Wash.

1 App. 868, 879-82, 107 P.3d 98, *review denied*, 155 Wash.2d 1006 (2005) (noting civil actions
2 may be stayed pending the outcome of appeals).

3 Tolling of the statute of limitation ceased for Mr. Spencer once he was sentenced to
4 life imprisonment in 1985. RCW 4.16.190(1). Similarly, tolling of Ms. Tetz's and Matthew
5 Spencer's claims ceased after they each turned 18 years old. *Id.* Ms. Tetz was born in 1979
6 and turned 18 in 1997; Matthew Spencer was born in 1975 and turned 18 in 1993. Dkt. 1, p.
7 6, ¶ 31. Thus, all of plaintiffs' state law claims were time-barred more than a decade before
8 this lawsuit was filed in 2011, with the exception of Mr. Spencer's defamation claim
9 (although any alleged defamation occurring before June 2009 is time-barred).

11 **B. There Is No Evidence Defendant Davidson Defamed Mr. Spencer**

12 Plaintiff alleges the Clark County Prosecutor's office issued a press release in 2010
13 that was defamatory. Dkt. 1, p. 40, ¶ 264. There is no admissible evidence Sergeant
14 Davidson, who by then had retired from the CCSO, played any role in issuing the press
15 release, let alone made a defamatory statement in that release. Even if he had done so, any
16 such statement would be conditionally privileged. *See Bender v. Seattle*, 99 Wash.2d 582,
17 601, 664 P.2d 492 (1983). Mr. Spencer is unable to prove by clear and convincing evidence
18 that Mr. Davidson abused the privilege by making a statement in the press release he knew
19 was false or in reckless disregard of its falsity. *See id.* Mr. Spencer also is unable to prove
20 Mr. Davidson was at fault for the alleged defamation, or that Mr. Spencer's already soiled
21 reputation was in fact damaged. Thus, Mr. Spencer's state law defamation claim against
22 Sergeant Davidson fails because Mr. Spencer can not prove the requisite elements.

25 //

C. Mr. Spencer Is Collaterally Estopped from Re-Litigating His Claims that Defendant Davidson Violated His Constitutional Rights by Allegedly Arresting Him Without Probable Cause, Allegedly Coercing Him at the Jail, and Allegedly Withholding Exculpatory Evidence

As summarized above, state and federal courts previously issued final judgments on constitutional issues Mr. Spencer attempts to re-litigate in this action. Collateral estoppel precludes re-litigation of these issues.

“State law governs the application of collateral estoppel or issue preclusion to a state court judgment in a federal civil rights action.” *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). “Federal law governs the collateral estoppel effect of a case decided by a federal court.” *Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997).

The collateral estoppel elements are substantially similar under federal and Washington law. The federal collateral estoppel doctrine has three elements: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Trevino*, 99 F.3d at 923. Washington’s collateral estoppel doctrine has four elements: “(1) the issue in the prior adjudication is identical to the issue presented in the second adjudication; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *Gausvik*, 126 Wash. App. at 884. The fourth element (injustice prong) focuses on procedural fairness - - *i.e.*, if a party to the prior litigation

1 had a full and fair hearing of the issues, collateral estoppel applies even if the result of the
 2 prior hearing was erroneous. *Thompson v. Dept. of Licensing*, 138 Wash. 2d 783, 799-800,
 3 982 P.2d 601 (1999).

4 Mr. Spencer claims defendants violated his Fourth, Fifth and Fourteenth Amendment
 5 constitutional rights in the following ways: (1) arrest and prosecution without probable cause;
 6 (2) failure to disclose exculpatory evidence, including the medical reports of two child
 7 victims; (3) coercion/conspiracy based on Sergeant Davidson's alleged romantic relationship
 8 with Mr. Spencer's second wife; and (4) deliberate fabrication of evidence, including use of
 9 allegedly coercive child interviewing techniques. Dkt. 1, pp. 45-58, ¶¶ 291-349. The first
 10 three of these alleged constitutional deprivations were previously litigated by Mr. Spencer in
 11 state and federal courts, resulting in final judgments on the merits. The fourth issue alleging
 12 coercive interviewing techniques was not squarely decided in Mr. Spencer's prior cases.
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14 At his 1985 plea hearing, Mr. Spencer acknowledged there was probable cause for his
 15 arrest and prosecution by confirming he had no basis to refute the three children's and their
 16 mothers' disclosures of sexual abuse, and the trial court so ruled. Freimund Decl. at Ex. 7 and
 17 Ex. 8, pp. 8-41 (including pp. 18-19, where Mr. Spencer acknowledged a jury would find him
 18 guilty beyond a reasonable doubt on each count, and p. 41, where the Court concluded
 19 "there's an overwhelming factual basis for the pleas, and there is sufficient evidence from
 20 which the jury could and likely would find Mr. Spencer guilty of each count beyond a
 21 reasonable doubt."). *See also id.*, at Ex. 5 (judicial finding of probable cause to arrest).
 22

23 Probable cause is a complete defense to Mr. Spencer's constitutional claims for
 24 malicious prosecution, false arrest and false imprisonment. *Lassiter v. City of Bremerton*, 556
 25
 26

1 F.3d 1049, 1054-55 (9th Cir. 2009). A conviction conclusively establishes probable cause for
 2 an arrest and prosecution, even if later reversed on appeal, unless the conviction was obtained
 3 through fraud, perjury or other corrupt practices. *Hanson v. City of Snohomish*, 121 Wash. 2d
 4 552, 564, 852 P.2d 295 (1993). Mr. Spencer's conviction was reversed based on newly
 5 discovered evidence in the form of two out of three victims' recantations, not based on fraud,
 6 perjury or other corrupt practices. *See In re Spencer*, 152 Wash. App. at 712.

8 As held in *Hanson*, Mr. Spencer is collaterally estopped from re-litigating his
 9 previously unsuccessful claims that his conviction was not supported by probable cause and
 10 instead was obtained through fraud, perjury, or other corrupt practices, such as alleged
 11 coercion by Sergeant Davidson or failure to produce allegedly exculpatory, material evidence.
 12 In 1988, the state Court of Appeals issued a final judgment affirming the trial court's rulings
 13 on the merits of the following issues: (1) Sergeant Davidson did not coerce Mr. Spencer into
 14 pleading guilty to further his alleged romantic interests with Mr. Spencer's second wife; and
 15 (2) a duty to disclose exculpatory evidence was not unconstitutionally breached by
 16 withholding Ms. Tetz's and Matthew Hansen's medical records or the King County
 17 prosecutor's opinion that Ms. Tetz's initial disclosure of abuse was insufficient to convict.
 18 Freimund Decl. at Ex. 10, pp. 3-4.

21 Similarly, in 1996, the federal district court issued a final judgment on the merits of
 22 the following constitutional issues: (1) Sergeant Davidson did not unconstitutionally coerce
 23 Mr. Spencer even if he visited Mr. Spencer in jail to further a relationship with Mr. Spencer's
 24 second wife; and (2) failure to disclose the two children's medical reports did not affect the
 25 constitutional validity of his conviction. Freimund Decl. at Ex. 13, pp. 9-13. The Ninth
 26

1 Circuit affirmed on the first ground, but remanded for an evidentiary hearing on the second
2 ground. *Id.*, at Ex. 14, pp. 4-6.

3 Following a three day hearing, the federal district court entered a final judgment that
4 (1) defendants did not possess a medical report regarding Matthew Hansen, so they had no
5 *Brady* duty to disclose that report, and (2) the medical report regarding Ms. Tetz was not
6 material so “Mr. Spencer’s due process rights were not violated when the state failed to
7 disclose the report.” *Id.*, at Ex. 15, pp. 2-4. (quote from p. 4). The Ninth Circuit affirmed this
8 final judgment, concluding the defendants in this case did not withhold material evidence in
9 violation of *Brady*. *Id.*, at Ex. 16, p. 2.

10
11 In summary, both state and federal courts have entered final judgments on three issues
12 Mr. Spencer improperly seeks to re-litigate: (1) there was probable cause for Mr. Spencer’s
13 arrest; (2) Sergeant Davidson did not unconstitutionally coerce Mr. Spencer to plead guilty;
14 and (3) the children’s medical reports and the King County prosecutor’s opinion were not
15 unconstitutionally withheld from Mr. Spencer contrary to *Brady*. Mr. Spencer received full
16 and fair hearings on these issues. Thus, he is now collaterally estopped from re-litigating
17 these three central issues in this lawsuit, warranting dismissal of his damage claims.
18

19 **D. Alternatively, Defendant Davidson Is Entitled to Qualified Immunity**

20 Qualified immunity also justifies dismissal of Mr. Spencer’s § 1983 claims against
21 Sergeant Davidson. Police officers are entitled to qualified immunity from § 1983 claims
22 when (1) no federal constitutional right has been violated, or (2) even if a violation is
23 established, the right was not clearly established at the time of the challenged conduct
24 sufficient to make a reasonable officer aware that he was violating the right. *Devereaux v.*
25
26

1 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). This immunity provides “ample room for
 2 mistaken judgments” by protecting “all but the plainly incompetent or those who knowingly
 3 violate the law.” *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Qualified immunity shields
 4 Sergeant Davidson from plaintiffs’ damage action because a reasonable officer could have
 5 believed his conduct was lawful in light of settled law in 1985.
 6

7 **1. Qualified immunity based on probable cause**

8 Police officers are entitled to qualified immunity for alleged Fourth and Fourteenth
 9 Amendment claims when a reasonable officer could have believed probable cause existed to
 10 arrest. *Hunter*, 502 U.S. at 230. Probable cause exists when police have knowledge based on
 11 reasonably trustworthy information that the person arrested committed a criminal offense.
 12 *Cunningham v. City of Wenatchee*, 345 F.3d 802, 811 (9th Cir. 2003), *cert. denied*, 541 U.S.
 13 1010 (2004). Child disclosures of sexual abuse standing alone are sufficient to establish
 14 probable cause. *Doggett v. Perez*, 348 F.Supp.2d 1198, 1204 (E.D. Wash. 2004).¹
 15

16 Before Mr. Spencer’s arrest, the police received detailed disclosures from Ms. Tetz
 17 and Matthew Hansen implicating Mr. Spencer, as well as corroborating information from the
 18 children’s mothers identifying alarming behaviors. Krause Decl. at Exs. 1-3. Also, Sergeant
 19 Davidson had verified Mr. Spencer was undisputedly registered at the motel where and when
 20 Matthew Hansen reported he was abused, and a television was mounted high on the wall of
 21 his motel room as the child described. Freimund Decl. at Ex. 4, p. 4. A reasonable officer
 22 would have concluded there was probable cause to arrest, just as a Superior Court Judge
 23
 24

25 ¹ RCW 9A.44.020(1) has provided since 1975 that “[i]n order to convict a person of any crime defined in this
 26 chapter [including child rape] it shall not be necessary that the testimony of the alleged victim be corroborated.”

1 concluded this information established probable cause when issuing a facially valid warrant
2 for Mr. Spencer's arrest. *Id.*, at Ex. 5.

3 Arresting officers are also entitled to qualified immunity for executing facially valid
4 arrest warrants. *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011). Moreover, the
5 prosecutor's exercise of independent judgment in deciding to file charges immunizes
6 investigating officers. *Newman v. County of Orange*, 457 F.3d 991, 993-94 (9th Cir. 2006),
7 *cert. denied*, 549 U.S. 1253 (2007). Accordingly, for any or all of these reasons, Sergeant
8 Davidson is entitled to qualified immunity from all claims based on an alleged lack of
9 probable cause to arrest and prosecute Mr. Spencer.
10

11 **2. Qualified immunity for alleged deliberate fabrication of evidence**

12 "[T]here is no constitutional due process right to have child witnesses in a child sexual
13 abuse investigation interviewed in a particular manner, or to have the investigation carried out
14 in a particular way." *Devereaux*, 263 F.3d at 1075. "Consequently, an allegation that an
15 interviewer disbelieved an initial denial and continued with aggressive questioning of the
16 child cannot, without more, support a deliberate-fabrication-of-evidence claim...."² *Id.*, at
17 1077. Coercive interrogation that does not undermine a suspect's free will is constitutional,
18 too. *Cunningham*, 345 F.3d at 310-11. To withstand summary judgment, plaintiffs "must, at
19 a minimum, point to evidence that supports at least one of the following two propositions: (1)
20 Defendants continued their investigation ... despite the fact they knew or should have known
21 he was innocent; or (2) Defendants used investigative techniques that were so coercive and
22
23
24

25 ² "It is common for sex abuse victims to suppress memories of the assault or deny that it happened."
26 *Cunningham*, 345 F.3d at 812.

1 abusive that they knew or should have known those techniques would yield false
2 information.” *Id.*, at 1076 (emphasis in original).

3 Plaintiffs can not prove Sergeant Davidson should have known Mr. Spencer was
4 innocent, or personally used investigative techniques he should have known would yield false
5 information. Even if plaintiffs could prove Sergeant Davidson personally used “aggressive or
6 manipulative” questioning of children, did not believe initial denials of abuse, had an “animus
7 and preconception” against Mr. Spencer, and withheld exculpatory evidence, none of these
8 allegations, even when taken together, would have been sufficient for a reasonable officer to
9 conclude in 1985 that Sergeant Davidson was violating Mr. Spencer’s rights by deliberately
10 fabricating false evidence. *See Devereaux*, 263 F.3d at 1076-79. Sergeant Davidson’s limited
11 role in Mr. Spencer’s arrest and prosecution was founded on a reasonable belief that Mr.
12 Spencer had sexually abused his children. *See also* Freimund Decl. at Ex. 8, p. 41 (sentencing
13 Judge’s conclusion the beyond reasonable doubt standard was met). Therefore, as was
14 similarly held in *Devereaux*, *Gausvik*, *Cunningham* and *Doggett*, Sergeant Davidson is
15 entitled to qualified immunity for alleged deliberate fabrication of evidence.
16
17

18 **3. Qualified immunity for alleged *Brady* violation**

19 Even if a reasonable officer would have known in 1985 that a supervising officer owed
20 a duty to disclose material exculpatory evidence during the pre-trial phase, plaintiffs are
21 unable to prove a reasonable officer would have known the alleged exculpatory evidence was
22 material. *See Smith*, 640 F.3d at 939-40 (summary judgment appropriate if *Brady* violation
23 did not involve material evidence). As outlined above, plaintiffs are estopped from claiming
24 the two children’s medical reports (one of which defendants did not possess) and the King
25
26

1 County prosecutor's opinion were material. Even if not estopped, the reasons that led state
 2 and federal judges to conclude these documents were immaterial would lead reasonable
 3 officers in 1985 to the same conclusion. Thus, Sergeant Davidson is entitled to qualified
 4 immunity for alleged failure to disclose exculpatory evidence.

5 **E. Mr. Spencer Is Unable to Prove a Conspiracy**

6
 7 "A conspiracy in violation of § 1983 requires proof of: (1) an agreement between the
 8 defendants to deprive the plaintiff of a constitutional right; (2) an overt act in furtherance of
 9 the conspiracy; and (3) a constitutional violation." *Gausvik*, 239 F.Supp.2d at 1104. There is
 10 no admissible evidence Sergeant Davidson entered into an "agreement" with other defendants
 11 to violate Mr. Spencer's constitutional rights, which all defendants deny. For reasons set forth
 12 above, there also is no evidence Sergeant Davidson violated Mr. Spencer's constitutional
 13 rights. Therefore, Mr. Spencer's conspiracy claim should be dismissed on the merits.

14 **E. Sergeant Davidson Did Not Proximately Cause the Alleged Damage**

15
 16 Mr. Spencer must prove Sergeant Davidson factually and legally caused a deprivation
 17 of his constitutional rights. *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). There
 18 is no vicarious or supervisory liability under § 1983. *Doggett*, 348 F.Supp.2d at 1185.

19
 20 Sergeant Davidson's personal participation in Mr. Spencer's arrest and prosecution
 21 consisted of four activities. First, Sergeant Davidson accurately verified Mr. Spencer was
 22 registered at the motel during the time Matthew Hansen reported he was abused. Freimund
 23 Decl. at Ex. 3, p. 4. Second, he was one of the arresting officers who executed the Court-
 24 ordered arrest warrant. Dkt. 1, p. 18, ¶ 113; Freimund Decl. at Ex. 5. Third, he participated in
 25 Mr. Spencer's post-arrest interview during which Mr. Spencer said, among other
 26

1 incriminating statements, "I must have done it if Little Matt said I did" Krause Decl. at
 2 Ex. 4, p. 3. Finally, he allegedly attempted to coerce Mr. Spencer to plead guilty during jail
 3 visits to further a romance with Shirley Spencer (which is denied).

4 Mr. Spencer is unable to prove that, but for Sergeant Davidson's alleged acts or
 5 omissions, he would not have been arrested, prosecuted and convicted. *See Osborn v. Butler*,
 6 712 F.Supp.2d 1134, 1159-60 (D. Idaho 2010) (causation is lacking under § 1983 absent
 7 evidence the defendant directed the outcome of the prosecution). The injury complained of is
 8 imprisonment by court order. In such cases, "the order of the court would be the proximate
 9 cause and the various preliminary steps [prior to sentencing] would be remote causes...." *Id.*
 10 Additionally, or alternatively, "the prosecutor's independent decision can be a superseding or
 11 intervening cause of a constitutional tort plaintiff's injury, precluding suit against the officials
 12 who made an arrest or procured a prosecution." *McSherry v. City of Long Beach*, 584 F.3d
 13 1129, 1137 (9th Cir. 2009), *cert. denied*, 131 S.Ct. 79 (2010). As was similarly held in
 14 *McSherry*, there is no evidence the prosecutor's independent decisions were influenced by
 15 anything Sergeant Davidson did or did not do, other than reliance on Sergeant Davidson's
 16 undisputedly accurate verification that Mr. Spencer was at the motel during the time Matt
 17 Hansen said he was abused there. Mr. Spencer is thus unable to prove Sergeant Davidson's
 18 alleged conduct was the factual and legal cause of his injury or damage.

22 IV. CONCLUSION

23 Based on the foregoing reasons, as well as the reasons and evidence set forth in the co-
 24 defendants' summary judgment motions, Sergeant Davidson is entitled to summary judgment
 25 dismissing all claims alleged against him with prejudice.

s/ Jeffrey A. O. Freimund
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I caused to be electronically filed Defendant Davidson's Summary Judgment Motion, Declaration of Sharon Krause with Exhibits 1-6, and Declaration of Jeffrey Freimund with Exhibits 1-26 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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